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IN THE

Supreme Court of the United States

October Term, 1972
No. .....

MARK STEVEN BARTON,

Petitioner,

vs.

THE STATE OF OREGON,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon.

Petitioner, Mark Steven Barton, prays that a Writ of Certiorari issue to review the judgment and decision of the Supreme Court of the State of Oregon entered on 31 March 1972 which refused to grant a review of the affirmation by the Court of Appeals of the State of Oregon of petitioner's conviction of First Degree Murder.

Opinions Below.

The refusal of the Supreme Court of the State of Oregon to grant review entered on 31 March 1972 is not reported and was without opinion. The opinion of the Court of Appeals of the State of Oregon is reported in .... Or. ...., 492 P. 2d 828 (1972). A copy of the Opinion appears in Appendix A hereto.

Jurisdiction.

The refusal of the Supreme Court of the State of Oregon was entered on 31 March 1972. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Questions Presented.

Petitioner is an innocent person who has been subjected to the imposition of criminal sanctions under a judgment and conviction obtained contrary to petitioner's legal and constitutional rights. The questions presented in light of the undisputed record are:

1. Whether the trial court erred in instructing the jury on First Degree Murder.

2. Whether the trial court erred in instructing the jury on Felony Murder.

Constitutional and Statutory Provisions Involved.

The pertinent Provisions of the Sixth and Fourteenth Amendment of the United States Constitution and the provision of O.R.S. 41.350 and O.R.S. 41.360 are set forth as Appendix B hereto.

Statement of the Case.

On 22 September 1969 the Grand Jury of Multnomah County, State of Oregon, returned an indictment charging petitioner and three others with the crime of First Degree Murder of unlawfully, and feloniously, purposely, and of deliberate and premeditated malice killing one Gary Eugene DeVillez by shooting him with a rifle.

Petitioner was tried separately by jury before the Honorable Alan F. Davis of the Circuit Court of Multnomah County, was found guilty by jury verdict of the crime charged and was sentenced to a term of life imprisonment. Petitioner is presently incarcerated by reason of the sentence.

An appeal to the Court of Appeals of the State of Oregon was timely filed and oral argument had. On 14 January 1972 the Appellate Court affirmed the conviction. The Opinion is reported at .... Or. ...., 492 P. 2d 828 (1972) and is attached hereto as Appendix A. Thereafter a petition for rehearing was filed and on 8 February 1972 the Court of Appeals of the State of Oregon denied the petition for rehearing.

On 3 March 1972 petitioner filed a Petition for Review with the Supreme Court of Oregon. On 31 March 1972 the Supreme Court of the State of Oregon denied without opinion petitioner's Petition for Review.

REASONS FOR GRANTING THE WRIT.

On the thirteenth of July, 1969, Mark Barton was present at the home of Robert Antonio Tremblay and Tina Lee Tremblay located at 610 East 20th Street, in Vancouver, Washington [T.R. 11, 17]. The Tremblays were members of a motorcycle club known as the Hessians [T.R. 13]. Mark Barton was a prospective member of the club [T.R. 16]. At this time the Tremblays and Mark Barton were watching television when three members of the Cossacks arrived and walked into the house. The three were Gary DeVillez, Robert Bean and Larry Anderson [T.R. 18].

Larry Anderson beat up Mark Barton who was seated on the couch [T.R. 19]. As a result of the beating Barton sustained a three or four inch cut on his forehead. During the fight DeVillez stood by the front door and Bean attempted to pull Anderson off Barton [T.R. 84]. After the fight as the three left the house Tina Tremblay threatened to call the goon squad and to kill the three [T.R. 87].

Robert Tremblay known as Rat stated that he would like to have a gun in case they came back. Clair Leroy Dalton then fifteen years of age who was present in the house at that time offered to and did get a gun [T.R. 10, 25]. The gun was a 22 caliber single fire rifle belonging to Dalton's father [T.R. 27, 37].

Dalton testified that on July 15, 1969, Rat stated that they would get Gary DeVillez and make him sweat it out [T.R. 40].

Christian Foulger testified that during July, 1969, he was renting the bottom story of the house located at 1505 Southwest Clay Street in Portland, Oregon [T.R. 183]. Gary DeVillez occupied one of the bedrooms in

the lower story of this house and paid Foulger rent [T.R. 184]. Also present were Susan Nelson and Barbara Dixon who occupied the other two bedrooms of the lower story [T.R. 183-184].

Foulger testified he heard knocking on a side door and then he saw Barton, Tina and Rat in the kitchen [T.R. 186-187]. Barton carried a primary chain and Rat carried the rifle [T.R. 187-188, 239]. Susan Nelson testified that she saw Tina with the rifle [T.R. 240]. Foulger testified that he saw the rifle in the hands of both Tina and Rat and that Tina gave the rifle to Rat who started firing a couple of shots through the hall and back door [T.R. 224].

Several shots were fired, Foulger saw Barton, Rat and Tina run out the front door and into a car. Rat was carrying the rifle [T.R. 192-193]. Foulger found Gary DeVillez in his room, laying in a pool of blood still breathing. Within a short time he died [T.R. 193-194].

James Wold a patrolman for the City of Portland testified that he arrived at the house at approximately 12:40 A.M. on July 16, 1969 and found that Gary DeVillez was dead [T.R. 254-255].

William J. Brady a physician, pathologist and head of the State Department of Death Investigation in the State Medical Investigator's office testified that he did the postmortem examination on DeVillez [T.R. 357-358]. His examination revealed a single gun shot wound on the front upper chest of DeVillez. The wound of entrance of the gun shot injury went from front to back and from left to right [T.R. 361]. DeVillez, in the opinion of Dr. Brady, died as a result of a gunshot wound of his chest and aorta with massive

internal hemorrhage [T.R. 362]. Dr. Brady also testified that DeVillez had two patterned injuries over his right forehead and over to the side and back of his right shoulder which ran in line, were evenly spaced, fresh, sharp, distinct and which, in Dr. Brady's opinion, would have been consistent with one who is struck by a motorcycle primary chain [T.R. 360-361]. The bullet that caused the death of DeVillez came from the 22 caliber rifle [T.R. 350].

James L. Hurt employed by the Portland Police Laboratory testified that there were particles of powder residue around the site of the bullet hole in the tee shirt of the deceased [T.R. 349, 353]. He testified that in his opinion based upon test firings of the gun and the powder residue on the tee shirt the rifle was fired from a distance of three to three and one half feet from the tee shirt [T.R. 353].

The rifle in question had a hair trigger and no safety [T.R. 38].

Barton earlier had worn a red hat [T.R. 38-39]. James Hurt testified that the red hat found at the scene was tested for blood which was found on the rear side inside the crown of the hat on the left side where there was an indentation with a blood stain [T.R. 351]. A trim clamp or goose neck matched the dent or indentation in the hat and the fibers of the hat in the left rear of the crown with the blood stain were broken [T.R. 353-54].

The Court's instructions to the jury on First Degree Murder contained the following instructions which are

based on O.R.S. 41.350 and O.R.S. 41.360 set forth in Appendix B hereto. The instructions given were:

> "The following presumptions are part of the Oregon law. They are disputable, and may be controverted by other evidence direct or indirect, but unless so overcome, you are bound to find in accordance with them. They are as follows: There is a presumption of an intent to murder, from the deliberate use of a deadly weapon, causing death within a year. There is a presumption of malice and guilty intent from the deliberate commission of an unlawful act, for the purpose of injuring another. There is a presumption that an unlawful act was done with an unlawful intent. There is a presumption that a person intends the ordinary consequences of his or her voluntary act." [T.R. 386-387].
>
> "A 'dangerous weapon' is one which is capable of producing death or great bodily harm. You are to determine whether the rifle and/or motorcyle chain, or both, were used by the defendant, or his accomplice or accomplices, in such a manner as to be a dangerous weapon. A loaded weapon is a dangerous weapon as a matter of law when used within shooting distance from the party assaulted." [T.R. 389-390].

On felony murder the Court instructed the jury as follows:

> "I have instructed you with regard to first degree premeditated murder. However, under our law, murder which is committed during the commission of or attempt to commit burglary in a dwelling, and as a consequence thereof, is known

as felony murder and is also first degree murder. Felony murder, as just defined, is murder in the First Degree whether the killing is intentional, unintentional or accidental. You are instructed that it is proper for the state to introduce evidence of felony murder under the indictment as drawn in this case. If felony murder is proved to your satisfaction beyond a reasonable doubt, you may return a verdict under that theory. In other words, if you find that the defendant, or his accomplice or accomplices, in the commission of or attempt to commit burglary in a dwelling, and as a consequence thereof, killed the victim Gary Eugene DeVillez, this is the equivalent of finding deliberate and premeditated malice as to the victim. The crime is first degree murder. Also specific intention and purpose to kill under these circumstances are likewise irrelevant." [T.R. 387].

The record does not indicate whether the jury returned a verdict of First Degree Murder based upon a theory of First Degree Murder or upon a theory of felony murder because the verdict forms submitted to the jury did not so indicate [T.R. 398].

Petitioner in his Brief filed in the Appellate Court raised the question with regard to felony murder, of merger that is where the only felony committed apart from the murder itself was the assault upon the victim which resulted in the death of the victim, the assault merged with the killing and could not be relied by the State as an ingredient of a felony murder. Petitioner in his Brief cited the cases of *People v. Sears*, 2 Cal. 3d 180, 84 Cal. Rptr. 711, 465 P. 2d 847 (1970); *People v. Wilson*, 1 Cal. 3d 431, 82 Cal. Rptr. 494,

462 P. 2d 22 (1969); *People v. Washington,* 62 Cal. 2d 777, 44 Cal. Rptr. 442, 402 P. 2d 130 (1965). At the time petitioner's Brief was filed in the Appellate Court, Oregon law was apparently contra to petitioner's contention *State v. Tremblay,* 4 Or. App. 512, 479 P. 2d 507 (1971). Prior to the time the Oregon Court of Appeals decided the instant case below, the same Court decided the case of *State v. Shirley,* ..... Or. App. ..... 488 P. 2d 1401 (1971) which held that an assault merged with the killing. Notwithstanding the last sentence of the appellate opinion, "Defendant cites no authorities we did not consider in *Tremblay.*" Petitioner did cite the *Shirley* case in his reply brief. The *Shirley* case was further cited in Petitioner's Petition for Review by the Oregon Supreme Court.

Apparently the Oregon Supreme Court and Appellate Court considered the conviction sufficiently based upon the First Degree Murder theory.

The Appellate Court as the Opinion notes, refused to consider petitioner's arguments relating to the presumptions because proper exception had not been taken and refused to exercise the discretion allowed it to consider the point.

The Oregon Courts have long recognized the principle that "Since the presumption of innocence is a species of evidence, instructions on conclusive presumptions as to intent should never be given in a criminal case." *State v. Steimile,* 253 Or. 54, 45 P. 2d 171 (1969); *State v. Jones,* 235 Or. 538, 385 P. 2d 759 (1963); *State v. Elliot,* 234 Or. 522, 383 P. 2d 382 (1963); *State v. Nodine,* 198 Or. 679, 259 P. 2d 1056 (1953). In the instant case the instructions given omitted the word conclusive.

Petitioner submits that the effect of the instructions on the presumptions was to withdraw the questions of specific intent from the jury thereby denying him his right to trial by jury guaranteed by the Sixth Amendment of the United States Constitution.

The jury was instructed that the rifle as a matter of law was a deadly weapon. The testimony indicates that petitioner did not at any time have possession of the rifle. DeVillez was dead, killed by a bullet from the rifle which was carried by Rat Tremblay. A number of shots were fired in the hallway but only one bullet entered the body of the deceased. The bullet was fired from a distance of but three to three and one half feet from the deceased from a gun with a hair trigger. From the evidence the jury could have concluded that petitioner went to the house with the Tremblays to frighten or assault the deceased not to kill him and that the gun accidentally discharged. The intent of the Tremblays is not known. They did not testify because of the constitutional protections against self-incrimination.

Once the objective facts contained or stated in the presumptions were found the effect was to remove from the jury's consideration the question of specific intent in derrogation of his constitutional rights and due process of law guaranteed by the Fourteenth Amendment of the United States Constitution.

In *Leary v. United States*, 395 U.S. 6, 23 L. Ed. 2d 57, 89 S. Ct. 1532 (1969) this Court stated,

> "[A] statutory presumption cannot be sustained if there be no rational connection between the fact provided and the ultimate fact presumed and the inference of the one from proof of the other is

arbitrary because of the lack of connection between the two in common experience." 395 U.S. at 33.

In *Morrissette v. United States,* 342 U.S. 246, 96 L. Ed. 288, 72 S. Ct. 240 (1952), this Court, where the issue was merely general intent rather than specific intent, stated

> "It follows that the trial Court may not withdraw or prejudice the issue by instruction that the law raises a presumption to intent from an act. It is often tempting to cast in terms of a 'presumption' a conclusion which a court thinks probable from given facts . . . we think presumptive intent has no place in this case. A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense. A presumption which could permit but not require the jury to assume intent from an isolated fact would prejudge a conclusion which the jury should reach of its own volition. A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect. In either case, this presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime." 342 U.S. at 275.

In addition to the questions of whether petitioner was rightly or wrongly convicted, petitioner submits that the questions presented are of general importance and ought to be reviewed by this Court. The use of

statutory presumptions in a criminal action are widespread. *See e.g.* cases collected in Seventh Decenial Digest, Vol. 10, Criminal Law key numbers 759(2) intent and malice and 778(6) intent and motive (West 1969) and subsequent Decenial Editions.

The decision in this case is in conflict in principal if not in decision with this Court's decisions in *Leary* and *Morrissette, supra.*

Presumptions given in jury instructions at best undermine the presumptions of innocence and at worst prejudge the questions to be decided by a jury.

Conclusion.

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and decision of the Supreme Court of the State of Oregon.

Dated: June 26, 1972.

Respectfully submitted,

PAUL CARUSO,
Attorney for Petitioner.

APPENDIX A.

The opinion of the Court of Appeals in the instant case is set forth as follows:

IN THE COURT OF APPEALS OF THE STATE OF OREGON

Department 2

State of Oregon,

Respondent,

vs.

MARK STEVEN BARTON,

Appellant.

Appeal from Circuit Court, Multnomah County.

Alan F. Davis, Judge.

Argued and submitted December 3, 1971.

Paul Caruso, Beverly Hills, California, argued the cause for appellant. With him on the briefs was Oscar D. Howlett, Portland.

Thomas H. Denny, Assistant Attorney General, Salem, argued the cause for respondent. With him on the brief were Lee Johnson, Attorney General, and John W. Osburn, Solicitor General. Salem.

Before Schwab, Chief Judge, and Langtry and Thornton, Judges.

LANGTRY, J.

Affirmed.

Defendant appeals from a conviction of first degree murder. ORS 163.010(1). He was jointly indicted with Tina Lee Tremblay, Robert Antonio Tremblay

and Raymond David Pister for killing Gary Eugene DeVillez on July 16, 1969. They were tried separately. Defendant assigns as error (1) the trial Court's instruction on "felony murder" based on burglary. Our resolution of these assignments of error does not require a statement of facts.

(1) Defendant failed to take proper exception to the instruction of which he complains. The exception made was:

> "* * * [W]e except to submitting the first degree murder instruction including all of the definitions contained in those instructions * * *."

The purpose of an exception is to apprise the trial court of any error in the instructions so that it may correct the error. State v. Charles, 90 Adv Sh 1413, 3 Or App. 172, 469 P2d 792, Sup Ct *review denied* (1970). Defendant's exception failed to do this.

The merits of defendant's assignment do not warrant exception to the general rule that questions not raised in the trial court will not be considered on appeal. State v. Phillips, 92 Adv Sh 95, ... Or App ...., 481 P2d 381, Sup Ct *review denied* (1971).

(2) The court instructed the jury that if it found the defendant or his accomplices caused the death of DeVillez while committing or attempting to commit a burglary in a dwelling it was first degree murder. Defendant argues the instruction was error because the assault which was coupled with the breaking and entering to make up burglary merged with the

ultimate killing, and, therefore, the burglary could not be relied on as an ingredient of "felony murder." We considered precisely the same question in a companion case, State v. Tremblay, 91 Adv Sh 1523, 4 Or App 512, 479 P2d 507, Sup Ct *review denied* (1971), and decided it contrary to the defendant's position. Defendant cites no authorities we did not consider in *Tremblay*.

Affirmed.

APPENDIX B.

O.R.S. 41.350 in pertinent part provides: *Conclusive Presumptions*

The following presumptions, and no others, are conclusive:

(1) An intent to murder, from the deliberate use of a deadly weapon, causing death within a year.

(2) A malicious and guilty intent from the deliberate commission of an unlawful act, for the purpose of injuring another.

O.R.S. 41.360 in pertinent part provides: *Disputable Presumptions*

All presumptions other than conclusive presumptions are satisfactory, unless overcome. They are disputable presumptions, and may be controverted by other evidence, direct or indirect, but unless so overcome, the jury is bound to find according to the presumption.

The following are of that kind:

(1) A person is innocent of crime or wrong.

(2) An unlawful act was done with an unlawful intent.

(3) A person intends the ordinary consequence of his voluntary act.

AMENDMENT VI—UNITED STATES CONSTITUTION

In all criminal proceedings, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the

nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT XIV—UNITED STATES CONSTITUTION

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.